RECORD
AND
BRIEFS

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No. 16-1423

IN THE

Supreme Court of the United States

KEANU D.W. ORTIZ,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITIONER'S REPLY BRIEF

BRIAN L. MIZER
JOHNATHAN D. LEGG
LAUREN-ANN L. SHURE
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

Counsel for Petitioner

August 30, 2017

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PETITIONER'S REPLY BRIEF

In its brief in opposition, the government does not dispute that Judge Mitchell's appointment to the Court of Military Commission Review (CMCR) as an "additional judge" under 10 U.S.C. § 950f(b)(3) raises an "important question of federal law that has not been, but should be, settled by this Court," S. Ct. R. 10(c), *i.e.*, whether it triggers the dual-officeholding ban codified at 10 U.S.C. § 973(b)(2). Because § 973(b)(2) is a reflection of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972), and because this question is the subject of five pending petitions for certiorari encompassing 175 court-martial appeals,[1] it would have been impossible to argue otherwise.

Instead, the government's opposition reduces to the absence of a circuit split and superficially plausible arguments for why Judge Mitchell's CMCR appointment did not disqualify him from hearing Petitioner's appeal to the Air Force Court of Criminal Appeals (CCA). Opp. 8–16. On closer inspection, however, these merits arguments do not withstand scrutiny. And like the Court of Appeals for the Armed Forces (CAAF) in its decision below, the government fails to explain what purpose § 973(b)(2) would serve on its reading, or why Congress in 1983 would have chosen to eviscerate such a major codification of civilian control of the military. Indeed, the disturbing

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1. These questions are also presented in *Dalmazzi* v. *United States*, No. 16-961; *Cox* v. *United States*, No. 16-1017; *Alexander* v. *United States*, No. 16-9536; and *Abdirahman* v. *United States*, No. 17-243. Counsel for Petitioner is also counsel of record in *Dalmazzi*, *Cox*, and *Abdirahman*.

implications of the government's position not just for these cases, but beyond the military justice system, only underscore the need for this Court's intervention.

Finally, as the government concedes, *see* Brief for the United States in Opposition at 22, *Dalmazzi* v. *United States*, No. 16-961 (U.S. filed May 15, 2017); Opp. 8 n.1, this Petition is an appropriate vehicle for deciding the Questions Presented. Although CAAF has continued to grant petitions for review properly raising dual-officeholding claims (thereby protecting this Court's jurisdiction, *see* 28 U.S.C. § 1259(3)), it appears to be doing so only pending the disposition of these cases.

To be sure, the issue may also eventually reach this Court in a case arising from the Guantánamo military commissions. There, the appointment of Judge Mitchell and three other active-duty military officers to the CMCR has created further uncertainty, and the D.C. Circuit is presently considering the issue through a mandamus petition from the alleged masterminds of the September 11 attacks. *See In re Mohammad*, No. 17-1179 (D.C. Cir. filed July 21, 2017).[2] On Petitioner's view of the merits, however, there would be no statutory or constitutional infirmity in these officers' service *as civilians* as "additional judges" on the CMCR under § 950f(b)(3)—a conclusion that provides yet another reason for this Court to grant certiorari here and settle the matter.

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2. The CMCR's unpublished June 21 ruling rejecting the defendants' dual-officeholding claim is reproduced in the Appendix to this brief. *See* Rep. App. 1a.

I. Judge Mitchell's CMCR Appointment Triggered the Dual-Officeholding Ban

The government's brief in opposition offers four arguments for why § 973(b)(2) did not disqualify Judge Mitchell from hearing Petitioner's CCA appeal. It claims that these arguments are "independent," Opp. 16, but they are not. Three of them reduce to the single contention that Judge Mitchell's CMCR appointment did not even trigger § 973(b)(2), because (1) "additional judges" on the Article I CMCR do not hold a "civil office"; (2) even if they did, that office does not "require[] an appointment by the President by and with the advice and consent of the Senate"; and (3) even if it does, Congress has authorized active-duty military officers to receive such an appointment. *Id.* at 8–13. As the Petition demonstrated, these merits-stage arguments are not only unavailing, but also flatly contrary to the government's longstanding interpretations of § 973(b)(2).

1. The most prominent example of this shift is the government's argument that CMCR judges do not hold a "civil office" because the duties of a CMCR judge are "military in nature" and CMCR judges "act pursuant to military, rather than civil, authority." Opp. 11–12. These assertions are factually incorrect and analytically irrelevant.

The CMCR is an Article I "court of record." 10 U.S.C. § 950f(a). In that regard, it is comparable to CAAF, *id.* § 941, and the U.S. Court of Appeals for Veterans' Claims, 38 U.S.C. § 7251—and materially different from the CCAs. *But see* Opp. 12.[3] Thus, the

3. The government's claim that, on Petitioner's reading, CCA judges would hold a "civil office," Opp. 12, is shallow and mistaken. It is the CCAs' structure, not their function, that

implications of the government's position not just for these cases, but beyond the military justice system, only underscore the need for this Court's intervention.

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CMCR's authority stems from Congress, not the military. *See Freytag* v. *Comm'r*, 501 U.S. 868, 888 (1991) (noting implications of Congress's decision to transform an agency into an Article I court). Nor do CMCR judges exercise a "traditional military function." Pet. 15 & n.5.

The government insists that the Petition cited "no authority endorsing [this] understanding of Section 973(b)." Pet. 12. In fact, the Petition cites the unbroken line of Department of Justice opinions suggesting that an office's substantive function is irrelevant to whether it is a "civil office." Pet. 6–7.

As the Office of Legal Counsel put it in 1983, "the applicability of [§ 973(b)(2)] was not to depend on whether the duties of the civil office were undertaken in obedience to military orders." Pet. 14 (quoting Off. of Legal Counsel, Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations 16 (May 17, 1983) [hereinafter "1983 OLC Memo"]);[4] *see also*

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distinguishes them from the CMCR. Pet. 5. Unlike the CMCR, the CCAs are not Article I "courts of record," and their military judges do not hold a separate "office" in the first place. *See Weiss* v. *United States*, 510 U.S. 163, 170–72 (1994). *But see* Opp. 16 ("Judge Mitchell holds two distinct offices.").

But even if military judges on the CCAs nevertheless did hold a "civil office," it is not one that implicates the dual-officeholding ban, because it does not require nomination by the President and confirmation by the Senate. *See Edmond* v. *United States*, 520 U.S. 651, 661–66 (1997). Indeed, as the Petition explained, Congress added that narrowing requirement to § 973(b)(2) in 1983 entirely *because* "civil office" is interpreted so capaciously. Pet. 6–7.

4. The 1983 OLC Memo is available at https://perma.cc/YLM8-KTR6.

Memorandum for the General Counsel, Gen. Servs. Admin., 3 OP. O.L.C. 148, 150 (1979) ("The Attorneys General . . . have ruled that . . . the policy of the statute points to a very broad interpretation of the term 'civil officer.'"); Army Officer Holding Civil Office, 18 OP. ATT'Y GEN. 11, 12 (1884) ("[T]he policy of [§ 973(b)] points to a very liberal interpretation of the phrase 'civil office.'").[5]

2. The government also maintains that "additional judges" on the CMCR do not hold an office "that requires an appointment by the President by and with the advice and consent of the Senate," § 973(b)(2)(A)(ii), because § 950f(b)(2) authorizes the *assignment* of judges to the CMCR without appointment. As the Petition explained, however, this argument requires ignoring Congress's clear intent to distinguish between "assigned" CMCR judges under § 950f(b)(2) and "additional" CMCR judges appointed under § 950f(b)(3). Pet. 9.

The government does not (and could not) contest that, at the time Judge Mitchell heard Petitioner's appeal, he was serving on the CMCR in the latter capacity—a capacity that, by statute, required presidential nomination and Senate confirmation. *See* § 950f(b)(3). In any event, insofar as CMCR judges are principal Executive Branch officers, if § 950f(b)(3) does not "require[] an appointment by the President by and with the advice and consent of the Senate," § 973(b)(2)(A)(ii), then the Appointments Clause does.

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5. Thus, shortly after § 973(b) was enacted, Attorney General Williams concluded that it would violate § 973(b) for General Sherman to serve on even a temporary basis as Secretary of War. *See* Acting Secretary of War, 14 OP. ATT'Y GEN. 200 (1873).

3. In addition, the government correctly notes that Congress, in § 950f(b)(2), clearly intended that active-duty military officers would be *assigned* to the CMCR. As the Petition demonstrated, however, § 950f(b)(2)'s clear statement to this effect only proves the absence of similar authorization for military officers to be *appointed* as "additional judges" under § 950f(b)(3). Pet. 9–10; *see Weiss*, 510 U.S. at 172 ("This difference negates any permissible inference that Congress intended that military judges should receive a second appointment, but in a fit of absentmindedness forgot to say so."). Tellingly, the government does not argue that Congress has authorized the *appointment* of active-duty military officers to the CMCR as "additional judges" under § 950f(b)(3). Judge Mitchell's appointment to the CMCR as a military officer is therefore not "otherwise authorized by law." § 973(b)(2)(A).

II. 10 U.S.C. § 973(b)(5) Does Not Preclude Judge Mitchell's Disqualification

The government falls back on what CAAF actually held below—that "a violation of Section 973(b) [does] not entitle petitioner to relief." Opp. 13. As the Petition explained, this novel interpretation is based upon a misreading of the text of § 973(b)(5), which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." Pet. 15–17. CAAF's (and the government's) view appears to be that this text thereby immunizes military officers from suffering any sanction for violating the dual-officeholding ban.[6]

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6. To that end, the government has now argued that § 973(b)(5) also precludes challenges to actions undertaken by

As the Petition noted, this argument fails under settled principles of statutory interpretation. Pet. 15–18. But more importantly for present purposes, a contrary conclusion would only bolster, not weaken, the case for granting certiorari.

1. Whereas these cases present the specific issue of active-duty military officers serving as Article I judges, § 973(b) has historically swept far more broadly, limiting the ability of men and women in uniform to simultaneous hold almost all Cabinet positions, thousands of other civil offices within the federal government, and elective office at the state or federal levels. Indeed, the dual-officeholding ban was designed and intended "to assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); *see also* 1983 OLC Memo, *supra*, at 16 ("What was intended was a strict separation of the military and civilian establishment.").

On the government's (and CAAF's) reading of § 973(b)(5), the dual-officeholding ban would no longer be able to serve that vital purpose in any context, let alone with respect to the CMCR.[7] Given the profound implications such an interpretation would portend for

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military officers in unauthorized civil offices, as well. *See* Brief for the United States in Opposition at 20–21, *In re Mohammad*, No. 17-1179 (D.C. Cir. filed Aug. 25, 2017), *available at* https://perma.cc/QS4J-XUYC.

7. In its brief in opposition, the government responds that "[t]he Executive Branch is bound to comply with Section 973(b), and does so." Opp. 15. Regardless of how it is enforced (or by whom), the dual-officeholding ban serves no purpose if, as the government claims, there are no consequences for its violation.

civil-military relations in general, it is self-evident that it should be for this Court to say so. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 536 (1999) (emphasizing CAAF's narrowly circumscribed role, even within the military justice system).

2. In any event, "Congress . . . does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). And the text of the statute that created § 973(b)(5) proves that Congress did not intend (or effect) such a sea change in civil-military relations. Taking § 973(b)(5) first, the government makes much out of that provision's reference to "*any* action," Opp. 14, and ignores the qualifier—"in furtherance of assigned official duties."

The government agrees that § 973(b)(5) was prompted by a desire to preclude challenges to criminal convictions obtained by military officers who, prior to the 1983 amendments to § 973(b), had been *assigned* to hold a "civil office" as Special Assistant U.S. Attorneys. *See* Pet. 15–16; Opp. 14. Thus, Congress's focus was on immunizing military officers' actions in the civil office to which they had (unlawfully, as OLC concluded) been assigned, not on actions taken in their military capacity subsequent to their assumption of an unauthorized civil office.[8]

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8. Congress's focus on "assigned" duties also explains why § 973(b)(5) has had only retroactive effect, since it is no longer a violation of § 973(b)(2) for a servicemember to assume a civil office "in furtherance of assigned official duties." Pet. 15–16. The government's only counterargument is that Congress has since amended § 973 without eliminating § 973(b)(5). Opp. 14 n.4, The brief in opposition does not explain how those amendments bear on what Congress intended when it enacted § 973(b)(5).

This reading of § 973(b)(5)'s text is confirmed by two additional provisions of the same statute—neither of which the government acknowledges. First, after amending § 973(b) in section 1002(a) of the Department of Defense Authorization Act for FY1984, Congress separately provided that

> Nothing in [§ 973(b)], as in effect before the date of the enactment of this Act, shall be construed . . . to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer *in furtherance of assigned official duties.*

Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(b)(2), 97 Stat. 614, 655 (1983) [hereinafter "1983 Act"] (emphasis added). Thus, in the very next subsection of the same statute, Congress used the same phrase ("in furtherance of assigned official duties") to unambiguously refer to actions undertaken by military officers in the civil office to which they were assigned without authorization. *See Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Second, as the Petition noted, the same section of the 1983 Act also authorized the appointment of an active-duty military officer to the Red River Compact Commission, and specified that acceptance of that appointment "shall not terminate or otherwise affect such officer's appointment as a military officer." § 1002(d), 97 Stat. at 656; *see* Pet. 17. This proviso would have been wholly unnecessary if § 973(b)(5) has

the meaning claimed by CAAF and the government. Instead, it provides further evidence that § 973(b)(5) has no bearing here—and further reason why CAAF's decision to the contrary merits this Court's review.

III. The Decision Below Raises Serious Constitutional Questions

Finally, the government continues to give short shrift to the constitutional problems with Judge Mitchell's dual-officeholding. It is true, as the government argues, that the Petition "cites no authority holding that the Appointments Clause prohibits this sort of simultaneous service." Opp. 18. But that hardly proves the point, since Petitioner is unaware of any prior instance in which the same individual served simultaneously as both an inferior and a principal officer on two different federal courts. *Cf. Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) ("Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." (citation and internal quotation marks omitted)). Whether the Constitution allows such an arrangement is, as the Petition admits, a novel question. *See* Pet. 20. It is not at all clear, however, that the answer is yes.

The government also continues to mischaracterize the Commander-in-Chief Clause concerns raised by the decision below—under which military officers *qua* CMCR judges are at once in the chain of command but also the beneficiaries of statutory tenure protection. Pet. 20–21 (citing *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016)). The government's only responses are that Petitioner lacks standing to press this argument and that the D.C. Circuit has summarily refused to issue

a writ of mandamus in a case in which it was raised. Opp. 19 & n.5. The former contention misses the point and the latter contention is specious.

Petitioner is not claiming that the Commander-in-Chief Clause, if violated, would invalidate Judge Mitchell's participation in his CCA appeal. Pet. 21. The claim, instead, is that each of the interpretations of § 973(b) advanced by CAAF below and the government here raises serious constitutional questions, and that § 973(b) can—and therefore should—be construed by this Court to avoid them. But even if these difficult constitutional questions cannot be avoided, it is this Court that should answer them.

* *

The government does not argue against certiorari because the Questions Presented are unimportant in their substance or limited in their scope. Instead, the case against this Court's intervention rests on a series of novel and narrow interpretations of a 147-year-old statute intended to protect against undue military influence over civilian affairs—a statute the Executive Branch has, until now, always construed broadly in furtherance of that goal.

The government's new position does not just fail to persuade. It has also created avoidable uncertainty in hundreds of pending criminal cases, including the military commission trial of the alleged masterminds of the September 11 attacks. It raises constitutional questions of the first order. And, if the decision below is left intact, it could lead to a fundamental reorientation of civil-military relations, with ramifications far beyond the military justice system. This Court's intervention is therefore not only warranted, but imperative.

CONCLUSION

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin TX 78705
(512) 475-9198
svladeck@law.utexas.edu

BRIAN L. MIZER
JOHNATHAN D. LEGG
LAUREN-ANN L. SHURE
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

Counsel for Petitioner

August 30, 2017

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APPENDIX TO PETITIONER'S REPLY BRIEF

BRIAN L. MIZER
JOHNATHAN D. LEGG
LAUREN-ANN L. SHURE
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

Counsel for Petitioner

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United States,

Appellant

v.

Khalid Shaikh Mohammad

Walid Muhammad Salih Mubarek Bin 'Attash

Ramzi Bin al Shibh

Ali Abdul-Aziz Ali AKA Ammar al Baluchi, and

Mustafa Ahmed Adam al Hawsawi,

Appellee

ORDER

MOTION TO DISQUALIFY JUDGES SERVING IN VIOLATION OF 10 U.S.C. § 973(B) AND THE COMMANDER-IN-CHIEF CLAUSE OF THE U.S. CONSTITUTION AND TO ABATE UNTIL A PROPERLY CONSTITUTED COURT IS CONVENED

USCMCR CASE NO. 17-002

June 21, 2017

BEFORE:
BURTON, PRESIDING Judge
HERRING, SILLIMAN Judges

On May 8, 2017, Appellee Mohammad moved this Court to disqualify Presiding Judge Burton and Judge Herring from the panel designated to decide this appeal on the grounds that their service on the U.S. Court of Military Commission Review (USCMCR) is in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. Appellee Mohammad Motion 1, 14. Appellee Mohammad argued their service on the USCMCR violated the Fifth and Eighth Amendments to the U.S. Constitution. Appellee Mohammad Motion 1.[1] Appellee Mohammad moved "to abate these pro-

[1] In addition, Appellee Mohammad contended that Appellee Mohammad's panel was not properly constituted because 10 U.S.C. 950f(a) required a minimum of *three military* appellate judges on a panel. (emphasis added) Appellee Mohammad Motion 9-11. On December 31, 2011, Congress substituted "judges on the Court" for "appellate military judges" in 10 U.S.C. § 950f(a). P.L. 112-81, Div. A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011). The December 31, 2011 statutory substitution resolved this issue,

ceedings until a properly constituted Court is convened." *Id.* 1, 14. All co-Appellees joined Appellee Mohammad in this motion. On May 15, 2017, Appellant opposed the motion for disqualification and abatement.

Our Court has previously ruled a USCMCR appellate military judge position is not a "civil office" prohibited under 10 U.S.C. § 973(b). *See Order United States v. Al-Nashiri*, No. 14-001 (USCMCR May 18, 2016) (App. A). USCMCR military appellate judges are "authorized by law" and therefore they are not subject to the civil-office prohibition. *Id.* Our Court has also previously decided that assignment of military appellate judges to the USCMCR does not violate the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. *United States v. Khadr*, No. 13-005 (USCMCR Oct. 17, 2014) (App. B). We revisit those issues in this Order, and we arrive at the same holding.

Facts

The Military Commissions Act of 2009 ("2009 M.C.A."), section 950f(a) states, "*Establishment.*—There is a Court of record to be known as the [USCMCR] . . . . The Court shall consist of one or more panels, each composed of not less than three judges on

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and this issue will not receive additional discussion in this Order.

the Court." 10 U.S.C. § 950f(a). The 2009 M.C.A. provided for two ways to assign or appoint judges to the USCMCR:

> (b) *Judges.* (1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.
>
> (2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.
>
> (3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

10 U.S.C. § 948j(b) states:

> (b) *Eligibility.* A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be

> qualified for duty under section 826 of this title [10 USCS § 826] (article 26 of the Uniform Code of Military Justice) as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

On September 10, 2015, Secretary of Defense Ashton B. Carter appointed Lieutenant Colonel Burton and Colonel Herring, who are judges on the Army Court of Criminal Appeals, to the USCMCR under his authority in 10 U.S.C. § 950f(b)(2). Appellee Mohammad App. Tab 1. On September 23, 2015, they were sworn as USCMCR military appellate judges. Appellee Mohammad Motion 2 n.1 (citing Appellee Mohammad App. Tab. 1).

The Court of Appeals for the District of Columbia Circuit considered an Appointments Clause challenge to the Secretary of Defense's assignment of military judges from their Service Courts of Criminal Appeals to sit as USCMCR judges on Al-Nashiri's panel. *In re Al-Nashiri*, 791 F.3d 71, 84 n.7 (D.C. Cir. 2015) The Court said the President could nominate, and the Senate could confirm the military judges to be USCMCR judges to "put to rest any Appointments Clause questions regarding the CMCR's military judges." *Id.* at 86.

In response to the *Al-Nashiri* decision, President Obama nominated Lieutenant Colonel Burton and

Colonel Herring to the USCMCR, and on March 14, 2016, the Senate received the President's nominations. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). *See also United States v. Ortiz*, 2017 CAAF LEXIS 288 (C.A.A.F. Apr. 17, 2017); *United States v. Dalmazzi*, 76 M.J. 1, 2 (C.A.A.F. 2016). On April 28, 2016, the Senate confirmed them to be judges of the USCMCR. *See id.* (citing 162 Cong. Rec. S2600 (daily ed., Apr. 28, 2016)). On May 25, 2016, President Obama signed their commissions appointing each of them to be "an Appellate Military Judge of the United States Court of Military Commission Review." *See id.*

Discussion

Title 10 U.S.C. § 973 restricts specified officers on active duty from performance of civil functions, and § 973 states:

> (a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.
> (b) (1) This subsection applies--
> (A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);
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> ***

(2) (A) *Except as otherwise authorized by law*, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States--
(i) that is an elective office;
(ii) *that requires an appointment by the President by and with the advice and consent of the Senate*; or
(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5 [5 USCS §§ 5312-5317].
(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that
office or to perform those functions.
* * *
(5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

10 U.S.C. § 973 (emphasis added). In 1975, the Ninth Circuit considered whether a Navy officer's appointment as a California state notary caused him to lose his commission under 10 U.S.C. § 973. *Riddle v. Warner*, 522 F.2d 882 (9th Cir. 1975). In *Riddle*, the court assessed the legislative history of the statute and several opinions of the Attorney General and observed:

The current version of [10 U.S.C. § 973] had its genesis in an 1870 enactment. *See* Act of July 15, 1870, ch. 294, § 518, 16 Stat. 319. The legislative history is sparse; there appears to be no direct illumination of the problem. A comment by the chairman of the reporting committee, however, shows that a principal concern of the bill's proponents was to assure civilian preeminence in government, i.e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing "paramount" to it. *See* Cong. Globe, 41st Cong. 2d Sess. App. 150 (1870). Early comment on the statute suggests that the Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers. *See, e.g.*, 13 Op. Att'y Gen. 310, 311 (1870) (position of Philadelphia Parks Commissioner determined to be a "civil office"); 15 Op. Att'y Gen. 551, 553 (1876) (position as trustees of the Cincinnati Southern Railway determined to be a "civil office"); 35 Op. Att'y Gen. 187, 190 (1927) (position as head of Louisiana State University determined to be a "civil office").

Id. at 884 (noting state court had determined commission of state notary public was a nullity under state law, and holding 10 U.S.C. § 973 was not violated because Riddle was already a notary as a Navy Judge Advocate under 10 U.S.C. § 836(a)) (internal footnote omitted).

The term "civil office" in 10 U.S.C. § 973(b) is not defined in the statute; however, it was understood by way of "contrast to the term 'military office.' An 'officer of the Army,' holding, as he does, the latter, is to be inhibited from holding also the former. The two are antithetical; their duties are, if not inconsistent, at any rate, widely different, and there is to be no point where they include or overlap each other."[2] An appointment statute that includes military "[r]ank, title, pay, and retirement are the indicia of military, not civil, office." *See Smith v. United States*, 26 Ct. Cl. 143, 147 (Ct. Cl. 1891). Presiding Judge Burton and Judge Herring's appointments on the USCMCR meet the Court of Claims tests because officers meeting the military judge requirements of 10 U.S.C. § 836 are all field grade officers, sitting military judges on the Service Courts of Criminal Appeals, and eligible for military retirement upon completion of the requisite number of years of military service. *See* 10 U.S.C. §§ 836, 948j(b), and 950f(b)(2). *See also, e.g., Winchell v. United States*, 28 Ct. Cl. 30, 35 (Ct. Cl. 1892). It does

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[2] *Acceptance of Office in National Guard of a State by Officer on Active List of the Regular Army*, 29 U.S. Op. Att'y. Gen. 298, 299 (1912); 1912 U.S. AG LEXIS 63 at *3.

not matter that the President has seen fit to appoint and the Senate confirm civilians to the USCMCR because Congress expressly provided for civilians on the USCMCR under 10 U.S.C. § 950f(b)(3). *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). Congress has established a requirement for military officers to be additionally appointed by the President and confirmed by the Senate, beyond that included in their promotions to their rank, to certain specified positions, including:

the Chairman and Vice Chairman of the Joint Chiefs of Staff, 10 U.S.C. §§ 152, 154; the Chief and Vice Chief of Naval Operations, §§ 5033, 5035; the Commandant and Assistant Commandant of the Marine Corps, §§ 5043, 5044; the Surgeons General of the Army, Navy, and Air Force, §§ 3036, 5137, 8036; the Chief of Naval Personnel, § 5141; the Chief of Chaplains, § 5142; and the Judge Advocates General of the Army, Navy, and Air Force, §§ 3037, 5148, 8037. *See Weiss v. United States*, 510 U.S. 163, 171 (1994). None of the statutory provisions requiring Presidential appointment and Senate confirmation of commissioned officers to these positions specify the inapplicability of 10 U.S.C. § 973. *See* 10 U.S.C. §§ 152, 154, 3036, 3037, 5033, 5035, 5043, 5044, 5137, 5141, 5142, 5148, 8036, 8037. There have not been any challenges of their appointments under 10 U.S.C. § 973 in the courts. Military commissions are a traditional military function. U.S. military commissions or similar military tribunals have been used to prosecute offenses against the

law of war since the Revolutionary War.[3] There were 4,271documented military commission trials during the Civil War and another 1,435 during Reconstruction.[4] In the wake of World War II, the U.S. military acted as a leading proponent of and participant in thousands of war crimes trials in Germany and the Far East for violations of the law of war.[5]

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[3] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006); *Ex parte Quirin*, 317 U.S. 1, 31 n. 9 (1942) (indicating in 1780 British Major Andre was tried by a "Board of General Officers" for spying), *see also* George Davis, *A Treatise on the Military Law of the United States* 308 n.1 (rev. 3d ed. 1915) (indicating British Major Andre's tribunal was "in fact a military commission."). *See also United States v. Hamdan*, 801 F. Supp. 2d 1247, 1294-1310 (USCMCR 2011), *rev'd on other grounds, Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (describing military commissions from the Revolutionary War through the post-World War II trials).

[4] David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 40 n. 223 (2005) (citing Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 168-73, 176-77 (1991)).

[5] *See* Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No. 10*, at 1, 234-35 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf. *See also* International Criminal

In *Quirin*, the Supreme Court addressed the authority of the President to try by military commission cases of the Nazi saboteurs captured on U.S. soil and accused of violations of the law of war as follows:

> Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. . . . By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war. . . . *An important incident to the conduct of war is the adoption of measures by the military command* not only to repel and defeat the enemy, but to seize and *subject to disciplinary measures those enemies who in their attempt to thwart or impede our*

Court website, Link-Allied Tribunals of the Far East, Link-United States of America, Link-Yokohama Trials, is the Internet location for numerous trials of Japanese war criminals by the Eighth U.S. Army, https://www.legal-tools.org/en/browse/; *In re Yamashita*, 327 U.S. at 1 (1946).

> *military effort have violated the law of war.*

Ex parte Quirin, 317 U.S. 1, 28-29 (1942) (emphasis added; internal footnote omitted). The word "military" is used in the 2009 M.C.A. more than 450 times. It is beyond dispute that military commissions are primarily a military function with a direct connection to the law of war. There is no evidence that Congress intended to limit service on the USCMCR to civilians, especially in light of the specific declaration in 10 U.S.C. § 950f(b)(2) that military appellate judges could be appointed to the USCMCR.

The Department of Justice, Office of Legal Counsel observed that the phrase "otherwise authorized by law" in 10 U.S.C. § 973(b) need not be mentioned in the appointment statute to be effective.[6] The appointment statute does not, for example, need to indicate that the position to which a military officer is appointed in the appointment statute is an exception

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[6] *See Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 2016 OLC LEXIS 3, *6-*7, *10-*11 (Mar. 24, 2016) (2016 OLC Opinion) (holding military commissioned officers are "authorized by law" to hold civilian offices while on terminal leave even though that "position was covered by [10 U.S.C.] section 973(b)(2)(A).").

to the prohibition in 10 U.S.C. § 973.[7] Moreover, § 973's "'otherwise authorized by law' clause also does not list specific statutes authorizing active duty officers to hold particular civilian offices."[8]

In addition, 10 U.S.C. § 950f(b)(2), currently applying to only three military appellate judges assigned to the USCMCR, is more specific than 10 U.S.C. § 973(b)(2)(A)(ii) (currently over 1,000 Presidential appointments with Senate confirmation (PAS)),[9] and 10

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[7] *See id.*

[8] *Id.* at *10 (citations omitted).

[9] There are about 1,212 Presidential appointments with Senate confirmation (PAS) and the PAS includes "[c]abinet secretaries and their deputies, the heads of most independent agencies, and ambassadors." Zach Piaker, Center for Presidential Transition, Partnership for Public Service website (Mar. 16, 2016), http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php. *See* Christopher M. Davis and Michael Greene, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, Congressional Research Service RL30959 (May 3, 2017); Henry B. Hogue and Maeve P. Carey, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, Congressional Research Service R44083 (June 22, 2015) (noting the PAS process involved more than 1,000 in Executive Branch alone). *See also, e.g., United States v. Burns*, 79 U.S. 246, 252 (1871) (con-

U.S.C. § 950f was more recently amended than 10 U.S.C. § 973.[10]

Commander-in-Chief Clause of the U.S. Constitution

Appellee Mohammad explained his argument challenging the appointments of Presiding Judge Burton and Judge Herring as follows:

> Accepting an appointment as a federal appellate judge on an independent Article I court of record is constitutionally incompatible with the status of a serving commissioned officer. Judges appointed

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cluding the Secretary of War held a "civil office," because the Secretary "is a civil officer with civil duties to perform, as much so as the head of any other of the executive departments."). *See also* 2016 OLC Opinion, *supra* n. 6, at *11-*13 (discussing "rule of relative specificity").

[10] *See* P.L. 112-81, Div A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011) (most recent amendment of 10 U.S.C. § 950f); P.L. 108-136, Div A, Title V, Subtitle D[E], § 545, 117 Stat. 1479 (Nov. 24, 2003) (most recent amendment of 10 U.S.C. § 973). *See also United States v. Estate of Romani*, 523 U.S. 517, 532-33 (1998) (later, more specific statute governs); *Tenn. Gas Pipeline Co. v. FERC*, 626 F.2d 1020, 1022 (D.C. Cir. 1980) (citations omitted).

to the USCMCR under § 950f(b)(3) cannot be reassigned or otherwise removed from the USCMCR for any reason other than good cause. This level of tenure protection, only slightly below the "good behavior" tenure of an Article III judge, is irreconcilable with the President's constitutional authority as Commander-in-Chief and therefore cannot stand.

* * *

Even if Congress had contemplated the "appointment" of military officers to the principal office of USCMCR judge – which is inconsistent with the scheme of 10 U.S.C. § 950f – the good cause tenure that accompanies such an appointment would be an unconstitutional encroachment on the President's ability to direct and supervise the duties of those in the chain of-command. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015)) ("[W]hen a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.'") (citation omitted); *Relation of the President to the Executive Departments*, 7 U.S. Op. Att'y. Gen. 453, 464 (1955); 1855 U.S. AG LEXIS 35 ("No act of Congress . . . can . . . authorize or create any military officer not subordinate to the President."). Unsurprisingly, there is no precedent for

> military officers simultaneously serving as principal officers with the attendant tenure protections for the chain-of command. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (failing to find a single "case where this Court has assumed to revise duty orders as to one lawfully in the service."). It is probably no coincidence that 10 U.S.C. § 973(b), discussed above, has long been a bar to military members' simultaneous holding of civil offices that could prevent the reassignment by their military chain of command.

Appellee Mohammad Motion 11-14.

The 2009 M.C.A. § 949b(b)(4) provides the reassignment limitations for USCMCR military appellate judges:

> (4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:
>
> (A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate

> military judge is a member, approves such reassignment.
>
> (B) The appellate military judge retires or otherwise separates from the armed forces.
>
> (C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).
>
> (D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

10 U.S.C. § 949b(b)(4).

The reassignment limitations in 10 U.S.C. § 949b(b)(4) along with other provisions in the 2009 M.C.A. are designed to ensure that the USCMCR is

free from improper influence. Congress has an important role in ensuring Appellees' military commission is protected from improper influence, and one way of doing that is to limit reassignment of appellate military judges. Congress's important role is specifically defined in the U.S. Constitution. The preamble of the Constitution "provides for the common defence." To implement that goal, the Constitution sets forth the powers of Congress as follows:

> [T]he Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. . . . And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

Quirin, 317 U.S. at 26. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson, J., concurring). The USCMCR appellate judges are not the only entity where Congress has addressed assignments and reassignments. Congress has enacted several statutes limiting assignments of military officers.

See, e.g., 10 U.S.C. § 154(a)(3) (defining tour length of Vice Chairman of Joint Chiefs of Staff); *id.* at §§ 661, 664, 668 (defining the qualifications, duration, and standards for tours of officers in joint duty assignments); *id.* at § 671 (prohibiting assignment overseas on land before completing entry-level training); *id.* at § 1161 (limiting the President's authority to drop an officer from the rolls for misconduct); *id.* at § 3033 (limiting the time an officer may serve as Chief of Staff of the Army). *See also, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 532, 540 (1999) (reversing CAAF decision under the All Writs Act to enjoin the President and other officials from dropping Goldsmith from the Air Force rolls under 10 U.S.C. § 1161).

Conclusion

We affirm our previous decision that USCMCR military appellate judicial positions occupied by commissioned officers qualified under 10 U.S.C. §§ 826, 948j(b), and 950f(b)(2) initially assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2), nominated by the President, confirmed by the Senate, and appointed by the President as "an Appellate Military Judge" under 10 U.S.C. § 950f(b)(3) to the USCMCR does not violate the civil office provision in 10 U.S.C. § 973(b). Military commissions are a traditional military function, and Presiding Judge Burton's and Judge Herring's service as military appellate judges is "authorized by law." The limitation on the President's removal or reassignment authority in the 2009 M.C.A. § 949b(b)(4) does not violate the Constitution's Com-

mander-in- Chief Clause. Appellee Mohammad's Motion does not establish disqualification of Presiding Judge Burton and Judge Herring. Accordingly, there is no basis to abate these proceedings.

ORDER

Therefore, it is hereby

ORDERED that Appellee Mohammad's motion does not establish a basis to disqualify Presiding Judge Burton and Judge Herring, and his motion to disqualify them is DENIED. It is further

ORDERED that Appellee Mohammad's motion does not establish a basis to require three military appellate judges to be assigned to Appellee's panel, and his motion to require three military appellate judges to be assigned to his panel is DENIED. It is further

ORDERED that Appellee Mohammad's motion that this Court declare the limitation in the 2009 M.C.A. § 949b(b)(4) on the President's authority to reassign appellate military judges to be a violation of the Constitution's Commander-in-Chief clause is DENIED. It is further

ORDERED that Appellee Mohammad's motion to abate his appeal is DENIED.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

[APPENDICES OMITTED]